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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 82 MISC.

UNITED STATES OF AMERICA *ex rel.*
JAMES FARNSWORTH,

Petitioner,

against

ROBERT E. MURPHY, Warden of Auburn State Prison, and
THE PEOPLE OF THE STATE OF NEW YORK,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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July 28, 1958

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Respondents respectfully pray that the writ be denied.

Opinion Below

The opinion of the United States Court of Appeals for the Second Circuit rendered on April 15, 1958, is reported at 254 F. 2d 428 (1958).

Jurisdiction

The judgment of the Court of Appeals was entered April 15, 1958. The petition for a writ of certiorari was filed on July 2, 1958. The jurisdiction of this Court was invoked under 28 U. S. C. A. § 1254.

Question Presented

Whether the allegations that a petitioner was not assigned counsel nor advised of his right to counsel at the time of the entry of his plea of guilty to four indictments charging forgery and obtaining money by false pretenses, and that he was advised by unnamed jail officials that his crime would be "treated as a misdemeanor" if he pleaded guilty, present those essential elements of unfairness necessary to a showing of denial of due process.

Statement

On September 9, 1929, in Criminal Court, Baltimore, Maryland, petitioner pleaded guilty to four indictments charging him with forgery and obtaining money by false pretenses for which he was sentenced to a total of one year in prison. On December 10, 1946, after trial in the County Court, Westchester County, New York, petitioner was convicted of burglary in the third degree and sentenced on March 26, 1947, under the terms of the New York Penal Law § 1942, as a fourth felony offender, to imprisonment for an indeterminate term, the minimum of which was to be not less than 15 years and the maximum his natural life. The four prior felonies upon which this sentence was based included the following:

> The convictions in the Criminal Court of Baltimore, Maryland, on September 9, 1929;

A conviction in the United States District Court for the District of Columbia on May 3, 1935 of the felonies of burglary and grand larceny;

A conviction on November 17, 1939 in the Corporation Court of the City of Norfolk, Virginia, of the felony of burglary; and

A conviction on December 14, 1939 in the Corporation Court of the City of Norfolk, Virginia, of the felony of burglary.

On February 2, 1956, the conviction of May 3, 1935 in the District of Columbia was vacated. *Farnsworth* v. *United States*, 232 F. 2d 59 (D. C. Circ. 1956). This, however, did not affect the term of petitioner's prison confinement, as three prior felonies remained in effect.

The issues raised at this time are based upon the following allegations regarding his 1929 Maryland conviction:

That at the time of the entry of his pleas of guilty he neither knew nor understood the nature of the charges against him;

That he had no funds to procure and was not furnished with counsel;

That he was unfamiliar with criminal law and procedure;

That he was not cautioned by the court as to the consequences of his pleas;

That unnamed jail officials advised him that he would be treated as a misdemeanor violator, and

That if he had understood the nature and consequences of his plea, he would have elected to stand trial.

These contentions were raised before and passed upon by Judge Brennan of the United States District Court for the Northern District of New York, who on January

30, 1957, denied petitioner's application for a writ of habeas corpus. On April 15, 1958, the United States Court of Appeals for the Second Circuit, with one judge dissenting, affirmed Judge Brennan's denial of the writ on the ground that petitioner had failed to allege facts sufficient to raise a federal question.

At the time of his Maryland conviction, petitioner was 23 years of age and had nearly completed his high school education. At the time of the commission of the offenses in question, he was a corporal in the United States Army. Both the District and Circuit Courts found that in view of his background, the particular facts involved, and the failure to allege other than in conclusory terms that he was denied due process, the failure to afford petitioner counsel at the time of his Maryland plea did not constitute deprivation of due process.

ARGUMENT

POINT I

Petitioner has failed to allege facts sufficient to present a federal question.

After a thorough review of the facts surrounding the 1929 Maryland conviction, a majority of the Court of Appeals found that the elements of unfairness necessary to a deprivation of due process had not been alleged by petitioner, and that a federal writ of habeas corpus had been properly denied him by the District Court. The dissent was predicated on a different assessment of the facts, although agreeing, with minor exceptions, with the principles reenunciated by the majority.

Without regard to the jurisdictional questions raised in the United States Court of Appeals for the Second Circuit by respondents and not raised by petitioner in his petition for a writ of certiorari, and ignoring the discussion

of the validity of the records of the Maryland Court, a factor not in issue in either the District or Circuit Court, no reason is shown why this Court should exercise its certiorari jurisdiction to review what is by this time a well settled point of law, i.e., that in non-capital cases the due process clause of the Fourteenth Amendment of the Federal Constitution does not require that a state prisoner be afforded counsel or informed of his right to counsel, without the showing of attendant circumstances which would cause that "fundamental unfairness" requisite to a denial of due process. *Gallegos* v. *Nebraska*, 342 U. S. 55 (1951); *Quicksall* v. *Michigan*, 339 U. S. 660 (1950); *Gibbs* v. *Burke*, 337 U. S. 773 (1949); *Bute* v. *Illinois*, 333 U. S. 640 (1948); *Betts* v. *Brady*, 316 U. S. 455 (1942). See also *Herman* v. *Claudy*, 350 U. S. 116 (1956); *Uveges* v. *Pennsylvania*, 335 U. S. 437 (1948).

The requisite attendant circumstances are nowhere alleged by petitioner and the cases cited by him in support of his contention that due process was violated do not bear him out. In all those cases additional factors were involved, such as an actual and prejudicial trial without the benefit of counsel; a question of the sanity of the defendant; an actual request for counsel which was denied; the involvement of a capital offense; the intentional misrepresentation of facts by the prosecution; or the actual infliction of a severe sentence.

As stressed by the majority of the Court of Appeals, none of these circumstances may be found in the case at bar, and petitioner has not made out that *prima facie* case which admittedly is required before a federal court will take jurisdiction. *Williams* v. *Kaiser*, 323 U. S. 471 (1945).

Assuming *arguendo* that petitioner was not offered the assistance of counsel and, in fact, was not represented by counsel, it is nevertheless abundantly clear that he has not shown that the Maryland proceedings were in any

way infected with that unfairness necessary to call for intervention by the federal courts in the administration of state criminal proceedings. Petitioner's own allegations refute his claim of complete ignorance of the charges leveled against him. He appreciated that there was distinction between a felony and misdemeanor charge and acted on this knowledge, as is evidenced by his plea, admittedly made in the hope that he "would be treated as a misdemeanor" offender.

That unnamed jail officials, of whatever unofficial status they were [not connected with either the District Attorney's office nor the court], may have advised him of this fact, does not mitigate against the validity of his conviction. If he was, in fact, told that his case would be "treated" as a misdemeanor, he was not misinformed—his total sentence in view of the possible 40 years he could have received on the counts to which he admitted guilt, was one year. This allegedly naive defendant struck an impressive bargain, and that subsequent criminal acts on his part may have subjected him to relatively harsher penalties, because of the New York State Multiple Offender statute, reflects neither on the wisdom of his choice, nor the good faith of those unnamed jail officials, who were in no way officers of the court. That this Maryland sentence has since plagued him is attributable only to his own subsequent criminal acts. If petitioner's contentions are to be given credence, it would require that every defendant be informed of the multiple offender statutes of the other states before there could be a finding of compliance with due process.

Petitioner's belated attempt to raise the question of the incidental loss of certain Maryland civil rights upon conviction as a felon, is without merit, as these incidental rights do not come within the protection afforded by the Constitution. *Ullmann* v. *United States*, 350 U. S. 422, 430 (1056).

The rule of law set forth in the cited cases is one of necessity and fairness, and calls for relief in the federal courts by review of state criminal proceedings only where the petitioner has clearly and unequivocally established that due process was violated. Respondent respectfully submits that the record before this Court utterly fails to bring the petitioner within the existing rule requiring a showing of fundamental unfairness.

CONCLUSION

For all the foregoing reasons respondent respectfully prays that this Court deny the petition for a writ of certiorari to the United States Court of Appeals for the Second Circuit to review the order affirming the denial of petitioner's application for a writ of habeas corpus.

Dated: New York, New York, July 28, 1958.

Respectfully submitted,

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